

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS L. GUERRERO,

Plaintiff-Appellant,

v

DEREK A. SMITH and GLEN I. SMITH,

Defendants-Appellees.

UNPUBLISHED

August 22, 2006

No. 268477

Ingham Circuit Court

LC No. 04-000125-NI

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

TALBOT, J. (*dissenting in part and concurring in part*).

Although I agree with the majority that the trial court erred in applying the “objectively manifested” requirement of MCL 500.3135(7) to plaintiff’s closed-head injury, I believe that the trial court properly held that plaintiff failed to present evidence that there may be a *serious* neurological injury. I also agree that the trial court failed to address plaintiff’s claims stemming from his neck and back injuries and the aggravation of preexisting conditions. I, therefore, respectfully dissent with regard to plaintiff’s closed-head injury claims, but concur in all other respects.

To survive summary disposition with regard to his claims for his closed-head injury, plaintiff need only present “a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries [who] testifies under oath that there may be a *serious* neurological injury.” MCL 500.3135(2)(a)(ii) (emphasis added). Although the requirements for a “serious body impairment” found in MCL 500.3135(7) do not apply to a “serious neurological injury,” the neurological injury must still be *serious*.

The trial court stated:

The Defendant[s] point[] to objective medical test results that indicate the Plaintiff suffered from a mild injury not a serious one. Specifically, Defendants argue the CAT scan and MRI did not show serious injury and that Plaintiff returned to work after the injury. It was not until at least two months had passed before Plaintiff sought physical therapy that concluded pretty successfully. Also, Defendants make a persuasive argument that there has not been a doctor that has specifically diagnosed that Plaintiff suffers from a serious closed head injury under the guidelines that have now been set forth that this Court must follow from Kreiner.

The record indicates Plaintiff continues to work, albeit in a limited capacity. Plaintiff does not suffer from serious medical problems that keep him up all night or interfere with his tennis play or his physical exercise. In this Court's opinion, Plaintiff has not provided support to pose a question of fact for the jury with respect to a serious closed head injury because the objectively manifested portion has not been stated by Doctor Andrews [sic, Andary].

Although the trial court erroneously applied the analysis for a serious body impairment set forth in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), to plaintiff's closed head injury, it still clearly considered whether plaintiff presented evidence that the injury was *serious*. My own review of the record confirms the trial court's determination that plaintiff's neurological injury was *mild*, as opposed to *serious*. Plaintiff's brief repeatedly refers to reports by Dr. Michael Andary describing plaintiff's neurological injury as mild:

"Since the time of the accident, [plaintiff] has experienced mild confusion and difficulty with organizational skills" [EMG report, September 5, 2002.]

"Additionally, [plaintiff] has some symptoms of a mild traumatic brain injury." [Id.]

"Mild traumatic brain injury status post motor vehicle accident, questionable whether [plaintiff] has any residual deficits." [Exam report, August 16, 2004.]

"Plaintiff has a history of a mild traumatic brain injury with migrainous components most likely occipital neuralgia or cervical tension headache and myofacial pain syndrome." [Interval history, September 20, 2004.]

Because the trial court did not err in finding that plaintiff failed to present any evidence that his alleged neurological injury was serious, as opposed to the volume of evidence that suggests that it was mild, the trial court did not err in granting summary disposition in favor of defendants with regard to plaintiff's closed-head injury claims. I would affirm the trial court's ruling because it reached the right result, albeit for the wrong reason. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

With regard to plaintiff's claims stemming from his back and neck injuries, as well from an aggravation of preexisting conditions, I agree with the majority that the trial court failed to directly address these claims on the record. I, therefore, concur with the majority's decision to reverse and remand with respect to those claims only. In all other respects, I would affirm.

/s/ Michael J. Talbot